Filed 12/9/03 P. v. Harney CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DAVID HARNEY, Defendant and Appellant.	C041989 (Super. Ct. No. CR116155)

David Harney (appellant) appeals from an order of the superior court committing him to the Department of Mental Health for a period of two years under the Sexually Violent Predators Act (SVPA). (Welf. & Inst. Code, § 6600 et seq.[1]) Appellant contends the People were improperly permitted to question him regarding the details of his past sexual experiences, and the prosecutor committed misconduct by arguing to the jury that it should consider the potential harm to victims in assessing whether it was likely he would reoffend. For the reasons stated

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

below, we conclude the court did not abuse its discretion in allowing the prosecution to question appellant and that there was no prosecutorial misconduct. Therefore, we shall affirm the judgment and order of commitment.

FACTUAL AND PROCEDURAL BACKGROUND

A petition alleged appellant had previously been convicted of two sexually violent offenses and was likely to engage in sexually violent predatory criminal behavior upon his release from prison.

This appeal is from an order of commitment following a jury trial verdict that found appellant to be a sexually violent predator (SVP).[2]

At trial, the parties stipulated appellant had previously been convicted of sexually violent offenses against two or more victims with whom he had a predatory relationship for which he received a determinate sentence in state prison. The first conviction occurred in 1983 and the second in 1992.[3]

The prosecution called appellant as a witness, who testified he is bisexual. Appellant testified that his first sexual experience occurred when he was 10 to 12 years old and was orally copulated and sodomized by a 14-year-old male

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[2] Appellant's first jury trial on the petition resulted in a hung jury.

[3] The petition alleged that in 1983 appellant had been convicted of two counts of committing a lewd act upon a child (Pen. Code, § 288, subd. (a)), and in 1992 appellant had been convicted of two counts of the same offense.

neighbor over an extended period of time. When appellant was 14, he in turn sexually molested a 10-year-old male neighbor. Appellant also engaged in mutual acts of oral copulation with a classmate while the classmate's younger brother watched. The younger brother also orally copulated appellant on one occasion. While still 14, appellant fondled several 10-year-old boys in a swimming pool.

After he turned 15, appellant had sexual intercourse in the back of a station wagon with a 17- or 18-year-old girl who was his sister's classmate. Appellant also began engaging in acts of masturbation and oral copulation with his 10-year-old male cousin. While still 15, a 28-year-old female teacher who lived in his apartment complex invited appellant into her apartment to fix her cabinets, but instead offered him a beer, disrobed, and ultimately engaged in sexual intercourse with appellant.

Appellant joined the United States Army when he was 17 years old. While stationed in Fort Lewis, Washington, appellant had an affair with a woman who also was in the service. Appellant had planned to marry her, but she left him after 10 or 12 months because she actually had been using him to make another man jealous. After the relationship ended, and prior to leaving for Germany, two female "GI's" "partied" with appellant at the Space Needle, and then engaged in a "threesome" with appellant as a "going-away present." While in Germany, appellant had a homosexual encounter with a male serviceman, as well as an ongoing affair with a female German citizen.

Following appellant's discharge from the army, his next

sexual experience occurred when he was working as a tow truck operator and the customer, who was male, offered to pay his bill by having sex with appellant. Appellant declined because payment had to be verified. The customer proceeded to orally copulate appellant anyway.

In 1983, appellant orally copulated two boys, ages six and 12, while they were playing in a junior high school pool. As a result, appellant was convicted of his first sexually violent offenses and spent almost two years in prison.

Appellant moved to Sacramento in 1986. In 1987, appellant had a relationship that lasted several months with a female member of his bowling team. At the same time, appellant had several homosexual experiences with a 17-year-old boy he met at the bowling alley. After the woman returned to her husband and the boy enlisted in the army, appellant met a woman he later married.

In 1991, appellant commenced a sexual relationship with a 17-year-old boy who lived in Elk Grove. At the time, appellant lived in South Sacramento with his wife and their two-year-old daughter. The sexual relationship with the boy consisted of mutual acts of masturbation and sodomy. While visiting the 17 year old, appellant met the boy's six-year-old male neighbor, whom appellant orally copulated. The molestations ceased in 1992 after appellant was arrested and ultimately convicted of his second sexually violent felony.

Appellant admitted that when he was younger, he found young boys sexually stimulating, but that he was no longer attracted

to them. When asked when he had stopped being attracted to young boys, appellant replied "it would be hard to give you an exact date, but I was in prison and come to the realization that, trying to dig out my past and my own feelings, that I was just repeating what happened to me when I was young." Appellant stated he was still attracted to adult males, but that he had not had a sexual relationship with another inmate while imprisoned during the preceding 10 years. Appellant testified that he did not need any treatment to avoid being attracted to young males.

At the commencement of the People's examination of appellant, defense counsel objected to the line of questioning concerning appellant's initial sexual relationship with his 14-year-old male neighbor. The court overruled the objection on the ground that the expert witnesses would testify that they had reviewed appellant's sexual history in detail, and that their opinions were based in part on those experiences. Defense counsel thereafter did not specifically object to questions regarding appellant's sexual experiences.

The People's first expert witness was Dr. Jack Vognsen, a psychologist. Dr. Vognsen testified that he had examined all of the records in appellant's file and personally interviewed him, which included appellant giving a detailed sexual history. Dr. Vognsen testified that he relied on this history, including appellant's relationship with persons other than young boys, in making his assessment.

Dr. Vognsen testified it was clear appellant suffers from

the mental disorder of pedophilia, for which there is no cure. In his view, appellant was "very likely" to reoffend. One test he administered gave a score indicating a 40 percent chance that appellant would be convicted of a sexually violent offense if released. In explaining the scoring mechanism under one of the assessment tests, Dr. Vognsen noted that studies had disclosed a higher rate of reoffense where the offender had exclusively male victims, and an even higher rate of reoffense where the victims were boys.[4]

The second expert to testify for the People was Dr. Dale Arnold, a psychologist who performs evaluations for the Department of Mental Health in SVPA cases. Like Dr. Vognsen, Dr. Arnold reviewed appellant's files and interviewed appellant in detail regarding his sexual history. Similarly Dr. Arnold testified appellant suffered from the mental disorder of pedophilia and posed a high risk of reoffending.[5]

Dr. Arnold said the treatment program at Atascadero State Hospital would benefit appellant because of its intensive nature, while an outpatient program, such as the high risk

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[4] Dr. Vognsen testified: "You get scored for having male victims. There is lots of research demonstrating that having male victims leads or indicates a higher risk of re-offense. Some studies indicate two or three times as many re-offenses occur if you have boy victims, especially if you have only boy victims. I gave him a score on that. All of his victims, with the exception of one allegation, have been boys."

[5] One of the tests Dr. Arnold administered disclosed appellant had a 73 percent chance of reoffending.

offender program in Sacramento County, would be inadequate for appellant's condition.

Joe Carranza, a parole agent in Sacramento County, testified the outpatient program he administers would be inadequate to provide effective treatment or monitoring of appellant.)

Appellant called two psychologists as witnesses. The first was Dr. Christopher Heard. Like the People's experts, Dr. Heard said he had elicited and relied on appellant's sexual history in making his evaluation. Utilizing one of the same tests that Dr. Vognsen had administered to appellant, Dr. Heard testified the test result was the same -- indicating a 40 percent chance that appellant would reoffened -- but that this percentage would be decreased by an outpatient program similar to the one parolees receive. Dr. Heard concluded appellant did not suffer from any diagnosed mental disorder that predisposed him to commit sexual offenses or that appellant would be unable to control his behavior. Dr. Heard said one of the factors that led him to conclude appellant was not suffering from pedophilia was his sexual relationships with adult men and women.

Appellant's second expert was Dr. Theodore Donaldson, whose practice was based on evaluations of actual or potential SVP's. Dr. Donaldson testified that he had performed 240 evaluations of potential committees under the SVPA, and found that 16 of the subjects met the criteria for commitment under the SVPA. Like the other experts, he had reviewed appellant's sexual history. Dr. Donaldson concluded appellant did not have any mental

disorder that would prevent him from controlling his sexual behavior.

DISCUSSION

I

The SVPA

The SVPA provides for the involuntary civil commitment of certain offenders, following the completion of their prison terms, who are found to be SVP's because they have previously been convicted of sexually violent crimes and currently suffer diagnosed mental disorders that make them dangerous because they are likely to engage in sexually violent predatory criminal behavior. (§ 6600 et seq.; *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 902.)

The SVPA is aimed at a select group of criminal offenders "considered to be extremely dangerous as the result of mental impairment, and who are likely to continue committing acts of sexual violence even after they have been punished for such crimes. [Citations.] The purpose of the SVPA is to use a civil commitment to treat SVP's for their current mental disorders and to reduce the threat of harm otherwise posed to the public." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1152 (*Buffington*).)

"One's initial or extended commitment under the SVPA depends upon his or her status as an SVP. 'An SVP is "a person who has been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence and who has a diagnosed mental disorder that makes the

person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).)'" (*People v. Superior Court* (*Ghilotti*), *supra*, 27 Cal.4th at p. 903.)

Therefore, in a proceeding to determine whether a prisoner is eligible for civil commitment under the SVPA (§ 6600 et seq.), the prosecutor bears the burden of proving beyond a reasonable doubt that: (1) the prisoner had been convicted of at least two separate sexually violent offenses; (2) the prisoner has a diagnosed mental disorder; and (3) that mental disorder makes it likely that the prisoner will engage in sexually violent behavior if released. (*People v. Poe* (1999) 74 Cal.App.4th 826, 830.)

II

Denial of Right to Fair Trial

Appellant initially contends that "subjecting him to the needless questions about his sexual orientation and the intimate details of his sexual history, specifically that involving consenting adults, allowed the prosecutor to present inadmissible and highly inflammatory evidence to the jury and deprived appellant of his constitutional right to a fair trial."

Appellant notes that "[t]he parties stipulated to the predatory offenses so there was no real need to go into the specific details of those offenses." Appellant acknowledges that "given the nature of the offenses involved and the alleged mental disorder involved, pedophilia, testimony about appellant's acts involving children was unavoidable." He notes,

though, that "the questioning here went well beyond acts involving children," and included questions "about the intimate details of his sexual history that [had] nothing whatsoever to do with offenses against children and in many instances did not even involve criminal behavior. Permitting this testimony solely because the same questions were asked by those who had evaluated appellant and were relied upon for their opinions was an insufficient justification for forcing appellant to reveal such intimate details of his life."

In appellant's view, "the jury was not permitted to find [him] to be a sexually violent predator based on his sexual orientation or his intimate relationships with consenting adults," so "there was no reason for the jury to learn of the intimate details of appellant's sexual history unless it involved predatory offenses." He adds that "the entire examination of appellant was irrelevant and unnecessary since any relevant facts for the jury's consideration of the expert testimony was testified to by the experts themselves." He concludes his "own testimony about his prior sexual experiences was merely cumulative of what he had already told the experts and what they would testify to in court."

Appellant cites no statute, or any authority for that matter, which makes his testimony *inadmissible*. Nor does he cite authority for the proposition that the admission of otherwise relevant evidence amounts to a constitutional violation of due process or fair trial. In fact, he concedes that the prosecution was permitted to call him as a witness

(*People v. Leonard* (2000) 78 Cal.App.4th 776, 791-793), that his out-of-court statements to the expert witnesses would not have been excluded under the hearsay rule because they were admissions, and that the experts could have testified to virtually every fact elicited during appellant's testimony because the experts had relied upon appellant's entire sexual history in making their diagnoses. (Evid. Code, § 801.[6])

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[6] "Evidence Code section 801 limits expert opinion testimony to an opinion that is '[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates . . . .' (*Id.*, subd. (b).)

"[¶] . . .

"Expert testimony may . . . be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. (Evid. Code, § 801, subd. (b); . . .

"So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Citations.] And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-618.)

III

Evidence Code Section 352

At bottom, therefore, appellant's claim must be premised on the view that the trial court should have *excluded* the evidence of his sexual orientation and sexual experiences under Evidence Code section 352.

The trial court has discretion under Evidence Code section 352 to exclude evidence if "'its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448.) We review rulings pursuant to Evidence Code section 352 under the abuse of discretion standard. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) We reverse only if the trial court's ruling was "'arbitrary, capricious, or patently absurd'" and caused a "'manifest miscarriage of justice.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) In assessing whether an Evidence Code section 352 ruling caused a miscarriage of justice, we apply the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Cunningham* (2001) 25 Cal.4th 926, 998-999; *People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

In *People v. Hubbart* (2001) 88 Cal.App.4th 1202, also a proceeding under the SVPA, the prosecution was permitted, over an Evidence Code section 352 objection, to elicit testimony from the appellant regarding the details of a number of his past sexual offenses. In upholding the trial court's decision, the

Court of Appeal explained why the testimony was important: "The testimony about defendant's string of sex offenses in 1981 and 1982 was highly probative of the two issues that the jury had to decide: whether defendant had a diagnosed mental disorder that made him a danger to the health and safety of others; and whether, due to that mental disorder, defendant was likely to engage in sexually violent behavior if released. Details about defendant's past sexually violent conduct were important to the jury's determination of these issues. The way that defendant targeted similar victims and committed the crimes in a similar manner showed his predatory behavior and the risk he posed if released. Although there was expert testimony on those issues, the details of the crimes were helpful for the jury's understanding of the experts' opinions and diagnoses. Although the details of the crimes were odious, it was necessary for the jury to learn not just that defendant had committed numerous sex offenses, but the scope and nature of his sexually predatory behavior." (*Hubbart*, at p. 1234.)

People v. Hubbart supports the conclusion that appellant's testimony regarding the circumstances of his past criminal behavior with children had a high probative value on the issues to be decided by the jury, and that it was not cumulative of any expert testimony. *People v. Hubbart* also supports the conclusion that appellant's testimony regarding past sexual experiences not amounting to criminal conduct also was probative

(though less so) on the same issues.[7] All of the experts testified that they had relied on appellant's entire sexual history in making their determination whether he met the criteria of an SVP. Appellant's testimony provided corroboration of the factual underpinnings of those reports. Appellant's testimony also set forth a chronological framework for the jury to understand his sexual development, and helped to explain why his own experts had reached the conclusion that he was not an SVP. At the same time, appellant's testimony allowed the jury to assess his demeanor and credibility regarding his sexual history.

As for appellant's claim that he was asked to provide too much detail regarding his past sexual relationships with consenting adults, all of the experts relied upon appellant's entire sexual history in forming their opinions. Although they were not asked to testify in detail regarding those relationships, such questioning would have been permissible under Evidence Code section 801.[8] If the experts had so

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[7] To some extent the testimony that appellant had a number of sexual experiences with adults rather than children also supported appellant's theory that he was *not* an SVP.

[8] The experts testified they had conducted lengthy interviews with appellant and that part of their inquiries concerned his sexual relationships with consenting adults. From this testimony one can reasonably infer that appellant provided at least as much detail to the experts as he did to the jury, and that his responses to their inquiries were used by the experts. The record does not reflect that appellant's examination of the experts at trial disputed these inferences.

testified, it would have been proper for the People to question fully appellant regarding these facts, either on direct or cross-examination. The procedure by which appellant's testimony was elicited did not prejudice him. That is to say, simply because appellant's testimony preceded rather than followed the experts did not have any appreciable impact on the case. In fact, by testifying first, appellant was given an opportunity to explain his side of the case before the more clinical testimony of the experts was presented.

In sum, the trial court did not abuse its discretion under Evidence Code section 352, and appellant was not denied a fair trial or due process of law.

IV

Prosecutorial Misconduct

Appellant's remaining contention is that the prosecutor committed misconduct by arguing to the jury that in making its assessment of whether appellant was likely to reoffend, the jury should consider the potential harm to victims. In appellant's view, allowing "the jury to determine a person's 'risk assessment' based on the potential harm results in a diminution of the standard of proof required to involuntarily commit a person."

Appellant cites two instances of misconduct, which are set forth in the following colloquy:

"MR. GOLDTHORPE: [A]nd in you making your determination, you are making this risk assessment, consider what is at stake. [¶] For instance, what I'm trying to explain here is if the

National Weather Bureau puts out a warning that there is a good chance of rain, many people are going to leave home without their umbrella. But if you get to the airport and the FBI says there is a chance there is a bomb on the plane, not many people are going to get on that plane.

"MR. AYE: Objection, your Honor, improper argument.

"THE COURT: Excuse me?

"MR. AYE: Improper argument.

"THE COURT: No, the objection is overruled.

"MR. GOLDTHORPE: So, in determining what level, what risk assessment you give, in determining this, look at what's at stake. What's at stake here? The victimization of children.

"MR. AYE: Improper argument."

After the jury was excused, defense counsel explained that the prosecutor was attempting to argue that the standard of "likely" should be reduced based upon the type of harm. The court questioned whether the prosecutor was making such an argument; the prosecutor stated that he was arguing a "possibility is not enough." The court then inquired of defense counsel: "Let me ask you this: In terms of risk assessment, what you have, as I understand the evidence, were young children of a tender age who may well be vulnerable." Defense counsel agreed, and the court asked: "In terms of risk assessment, you mean to tell me that the jury cannot consider the vulnerability of young children in light of the history of this respondent in terms of the risk assessment?" Defense counsel responded: "I do not think that the likelihood of someone -- that there has

been any evidence whatsoever that the likelihood of someone engaging in an act has anything to do with the vulnerability of a victim." The court thereafter overruled appellant's objection.

Appellant argues, without citation to authority, that it is improper for the trier of fact to consider the harm to potential victims as part of its deliberative process because the Legislature, by enacting the SVPA, has "already taken into account the potential harm [to victims] . . . ." The People, citing *Hubbart* v. *Superior Court* (1999) 19 Ca1.4th 1138, 1146, and *Buffington, supra,* 74 Cal.App.4th 1149, 1160, argue "the trial court properly permitted the prosecutor to argue to the jury the type of sexual deviance, namely the victimization of children, in making [its] risk assessment."

Neither of the cited cases support so broad a proposition that the jury may consider (or the prosecutor may argue) "the victimization of children" in making its determination under the SVPA. The cited cases, rather, note that the standardized assessment protocol of a potential SVPA committee requires an assessment of diagnosable mental disorders as well as various factors known to be associated with the risk of reoffense among sex offenders, including criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder.

As noted above, in an SVPA proceeding, the prosecutor must prove three things: (1) the prisoner had been convicted of at least two separate sexually violent offenses; (2) the prisoner

has a diagnosed mental disorder; and (3) *that mental disorder makes it likely that the prisoner will engage in sexually violent behavior if released.* (*People v. Poe, supra,* 74 Cal.App.4th at p. 830.)

Although the focus in an SVPA proceeding is on the *offender* rather than the *victim*, it does not follow that the jury is precluded from all consideration of potential victims in making its risk assessment. One of the risk factors to be considered includes the *type of sexual deviance* affecting the alleged predator under the SVPA. (*Buffington, supra,* 74 Cal.App.4th at p. 1160.) Contrary to the statement of defense counsel at trial, there was testimony (from Dr. Vognsen) that the likelihood of reoffense was significantly greater where the offender's victims were young boys, as in the case of appellant. Although Dr. Vognsen did not explain why the risk was greater in such cases, the jury could reasonably infer that part of the risk stems from greater unsupervised access society grants unrelated adult males to young boys.

"'"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"'" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "We review

prosecutorial remarks to determine whether there is a 'reasonable likelihood' that the jury misconstrued or misapplied the prosecutor's remarks." (*People v. Sanders* (1995) 11 Cal.4th 475, 526.)

In the present case (and contrary to appellant's argument), the prosecutor's remarks did not imply a lesser burden of proof. The court, by its comments, understood that the prosecutor was arguing that appellant was more likely to reoffend based upon the vulnerability of potential victims. There was, in fact, evidence before the jury that the age and sex of appellant's potential victims increased the likelihood of reoffense.

During argument, a prosecutor is given wide latitude and may comment on the evidence and reasonable inferences that may be drawn therefrom. (*People v. Williams* (1997) 16 Cal.4th 153, 221.) While the prosecutor's choice of words -- victimization rather than vulnerability -- possibly created a risk that the jury might stray from its charge, the references to victims were brief, and the jury was instructed that it should not be influenced by mere sentiment, conjecture, sympathy, prejudice, public opinion or public feeling.

In sum, there is no reasonable possibility that the jury would have reached a verdict more favorable to appellant in the absence of the challenged comments. (*People v. Wash* (1993) 6 Cal.4th 215, 261.) The record establishes that appellant had a long history of pedophilia that had been interrupted most recently by imprisonment. Notwithstanding this history, appellant seemed unaware of the severity of his condition. He

testified he did not need treatment, ostensibly because he was no longer sexually attracted to boys. In light of the record, the jury was entitled to view this testimony with distrust and to rely on contrary findings of the People's experts.

DISPOSITION

The judgment and order of commitment are affirmed.

ROBIE, J.

We concur:

SCOTLAND, P.J.

HULL, J.